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# In the Supreme Court of the United States

**OCTOBER TERM, 1963.**

**No. 469** [redacted]

**GEORGE ABERNATHY,**
*Petitioner,*

**vs.**

**STATE OF OHIO,**
*Respondent.*

## BRIEF OF RESPONDENT
**In Opposition to Petition for Writ of Certiorari.**

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**No. 469 Misc.**

GEORGE ABERNATHY,

*Petitioner,*

vs.

STATE OF OHIO,

*Respondent.*

## BRIEF OF RESPONDENT
## In Opposition to Petition for Writ of Certiorari.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County and the Ohio Supreme Court. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused to certify and review.

The decisions of the state court were based on state law. There is, therefore no substantial federal question involved.

## QUESTIONS PRESENTED.

The Petitioner claims:

I. That local police officers violated his constitutional rights against unreasonable search and seizure in that they forcibly entered a private apartment and seized contraband, namely, heroin, a derivative of opium.

II. That the narcotics so seized were offered and received in evidence in a prosecution for possession of such contraband narcotics.

III. That the prosecution was under a duty to disclose the name of the informer who gave the police officers the information which led to the arrest and the search without a warrant.

IV. That there were no exigent circumstances sufficient to permit the search of a private dwelling without a search warrant.

## THE CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE.

At about 1:10 A. M. on August 16th, 1961, Detectives Leslie Thompson, William Mariner, and Bernard Jones of the Narcotics Squad of the Cleveland Police Department received information that there was narcotic activity in apartment 22 of 2025 East 77th Street in Cleveland, Ohio. Acting upon this information, the three officers went to apartment 22 at that address, and upon arriving there, Detectives Mariner and Jones listened outside the door for about ten minutes (R. 48).

While these officers were listening they heard footsteps of individuals inside and the sound of glass breaking and also heard a male voice exclaim, "This is a good smack. It almost puts me to sleep." Upon questioning, Detective Jones indicated to the court that the exclamation quoted meant to him that someone was using heroin (R. 49).

These officers continued to listen at the door and then made their presence known by knocking at the door and identifying themselves in loud voices as members of the Police Department (R. 49). As they waited for an answer to their knock on the door at which they were listening, another door opened behind them and a man said, in a loud voice, "You must be the police." This man returned through the door from which he came and then opened the door the police were knocking on. The detectives gained entrance to apartment 22 by this man's opening that door (R. 50).

Upon entering the apartment the officers observed George Abernathy, Leonard Ashford, and Richard Williams (R. 50). George Abernathy was almost directly across the room from the entrance way (R. 50).

When the officers entered the apartment, they placed the three men under arrest. George Abernathy was searched and two tinfoil packets were taken from his person (R. 51-52).

When questioned, George Abernathy replied, "I'm a dope fiend" (R. 52). The packets were marked and held as evidence. The three men arrested were conveyed to police headquarters and statements were taken from them. Further conversation was had with the defendant George Abernathy wherein he related that he had paid $250.00 to a man he had met at East 100th and Cedar Avenue and that he had purchased these drugs for his own use and had taken them to the East 77th Street address (R. 56). This statement was reduced to writing and later introduced into the evidence. It was known by the members of the Police Department that the apartment was listed to Richard Williams, known to have a previous conviction for narcotics.

In addition to the two tinfoil packets that were found on the person of the defendant, George Abernathy, other tinfoil packets were found on the ground outside of the bathroom window. The defendant admitted to the members of the Cleveland Police Department that these packages were his.

After officers Jones and Mariner had gained entrance into the apartment, Detective Thompson came up and made a search of the apartment. He found the bathroom window was opened about 12 inches (R. 18). He went downstairs to the area just under the window where he

found a broken hide-a-key case which was magnetized. It had been broken open and there were cellophane packets containing a white power. They were taken back to the apartment and were marked, initialed and submitted to the laboratory for analysis (R. 82). They were later shown to the defendant and he stated that he had thrown them out of the bathroom window (R. 83-84).

Mr. Lee Peters of the Cleveland Police Department was called as an expert witness for the State of Ohio. It was stipulated that the tinfoil packets found in the pocket of George Abernathy contained a prohibitive amount of heroin and that the packets that were found outside of the window also contained a prohibitive amount of heroin (R. 94-95).

The defendant took the witness stand and admitted, upon cross examination, that he used some "stuff"—narcotics (R. 105). He further admitted that he bought it from a fellow and that he had a tinfoil packet containing white stuff, that was found to be positive for heroin, in his possession at the time of his arrest. The defendant was found guilty of possession of a narcotic drug as charged in the indictment.

Prior to the taking of testimony, the defendant in his case, filed a motion to suppress the evidence. Upon oral hearing of the motion and after presentation of evidence and the law given to the court by the defendant, the motion was overruled and the trial went forward on the indictment charging the defendant with the unlawful possession of a narcotic drug, to-wit: Heroin on the 16th day of August, 1961. The above statement of facts was based upon testimony elicited at the trial.

## ARGUMENT.

### WHEN THERE ARE REASONABLE GROUNDS TO MAKE AN ARREST, THE INCIDENTAL SEARCH IS LEGAL AND ITS FRUITS ARE ADMISSIBLE TO CONVICT.

I. In the first section of his argument, after citing portions of Sections 2935.03 and 2935.07 of the Revised Code of Ohio, the petitioner makes the claim that "The evidence here is clear that at the point when the petitioner and others were placed under arrest, they were not found violating a law of the State nor an ordinance of the City, nor were they informed as to the cause of their arrest." He concludes that the arrest was illegal in that these statutory grounds for an arrest without a warrant were not present.

The evidence discloses that at about 1:10 A. M., members of the Cleveland police department had received information of narcotic activity in the apartment on East 77th Street, and also that the officers knew this apartment was leased to Richard Williams, who was known to them as having been convicted in connection with narcotics (R. 47, 48, 49).

As a safeguard in acting upon this information, the detectives, before they made any move, listened outside the door and obtained additional grounds to believe that a felony was being committed because of the language they heard used inside the apartment (R. 49). They also rapped on the door loudly and informed the occupants that they were police officers. Immediately upon their entering the apartment they saw sufficient evidence in plain view in the substances and debris on the table in front of the petitioner to show that a felony had been committed.

II. In the second section of his argument, the petitioner claims that there is in this case a complete lack of

probable cause for his arrest, and he equates "reasonable grounds" with "probable cause." In *Jones v. United States*, 362 U. S. 257 (1960), 4 L. ed. 2d 697, this Court said:

> In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. Draper v. United States, 358 U. S. 307, 3 L. ed. 340, 79 S. Ct. 340. We there upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics, as corroborated by the fact that the informant's description of the defendant's appearance, and of where he would be on a given morning (matters in themselves totally innocuous) agreed with the officer's observations. We rejected the contention that an officer may act without a warrant only when his basis for acting would be competent evidence upon a trial to prove defendant's guilt.

In the case of this petitioner, the record simply does not support his conclusion that the real reason the officers did not seek a warrant was because they knew they could not qualify for the issuance thereof. The officers had good reason to believe that a felony was being committed in the apartment at the time in question. Before arresting the three men the officers, applying human reasoning as to the information they already had, used reasonable caution in acting upon that information. The arrest being made with probable cause, any evidence procured as a result thereof could be used in the trial and was not a proper subject of a motion to suppress.

In the next section of his argument, the petitioner states that no degree of probable cause will allow a search

of a home without a warrant, citing as authority *Agnello v. United States*, 269 U. S. 33, even though the quoted portion excepts "certain cases as incident to arrest."

One of the tests of the reasonableness of a search to be determined by the court is whether a search warrant would have issued on probable cause. "Probable cause" is, of course, incapable of any exact definition applicable to all cases. It has been defined by this Court in *Brinegar v. U. S.*, 338 U. S. 160, as:

> Probable cause exists when facts and circumstances within the officer's knowledge, and of which they have reasonable trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed.

And in *Henry v. U. S.*, 361 U. S. 98, 102, 4 L. ed. 2d 134, as:

> Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.

Therefore, in each case a question of fact is presented. It is apparent that here, when we take into consideration the fact that the officers received the information at 1:10 a.m. and the type of contraband involved in narcotic cases, there was no opportunity to obtain a search warrant. Without doubt there was probable cause for the issuance of a warrant but time was of the essence.

Petitioner's counsel premises his argument on his personal opinion that the Cleveland police are quick to make arrests without a warrant, for the sake of expediency "when they have unquestionable grounds to support a search," and in the next section of his argument he makes the claim that here there was sufficient opportunity to obtain a warrant. He does not set forth any facts to support this claim, but instead makes mention of the Ohio

statute which sets forth the conditions under which an officer may break down a door. In this case the officers did not use any force to gain entrance to the apartment. They were admitted by the voluntary acts of persons occupying the apartment. There was no trespass, actual or technical, such as was held to exist in the cases cited by the petitioner.

In this case the officers had reasonable grounds to believe that a felony was being committed; they had probable cause to arrest the defendant then and there, with or without a warrant; the search was made after and as an incident of the valid arrest of the defendant; and all evidence flowing from his arrest is therefore competent.

**THE TRIAL COURT DID NOT ERR IN REFUSING TO COMPEL THE DISCLOSURE OF THE NAME OF THE INFORMER.**

Petitioner claims that the identity of the informer, who supplied information to the police of activity in narcotics at the apartment where the defendant was arrested, was material to the establishment of probable cause for the arrest. The petitioner contends he was entitled to that information to test the reliability of the information upon which the officers acted.

A similar claim was considered by the Supreme Court of Ohio in *State v. Beck*, 175 O. S. 73 (decided June 26, 1963). Syllabus 2 of the *Beck* case holds:

> "2. It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him."

It is stated at p. 76 of the opinion:

> "As already noted, law-enforcement officers sometimes base a part of their activities on information supplied them by informers, and the only way to verify the reliability of such information is to make use thereof. Informers often frequent the vicinity where crime is planned, and the revelation of an informer's name would not only destroy his access to information concerning criminal activities but might also result in his sudden demise, thereby discouraging others from becoming informers.
>
> For many years, sound policy has indicated that the names of informers be kept secret. Only in an instance where an informer's identity would be beneficial and helpful to a defendant is there any basis for requiring disclosure. Here the officers acted on the information imparted by the informer plus additional knowledge already in their possession. The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated."

The opinion distinguishes the situation in the *Beck* case from that in *Roviaro v. United States*, 353 U. S. 53, 1 L. ed. 2d 639, where the informer not only gave information but took an active part personally in trapping and apprehending the offender. No such situation exists in the present case. Nor has the petitioner herein shown that the disclosure of the name of the informer would have been of real value to him.

## CONCLUSION.

In concluding the argument on behalf of the prosecution, we believe it is always important to remember that in any trial involving the administration of criminal justice, or in a civil trial for that matter, there must remain error in record because of the human failures of those persons who are administering the law. This case, however, was tried to the court, the court sitting both as judge and jury to determine the facts, the credibility of the witnesses and to apply the pertinent law so as to come to a conclusion as to the guilt or innocence of the defendant.

The question here is to determine whether George Abernathy received a fair trial and that none of his constitutional guarantees under the Fourth Amendment were violated by the improper receipt of evidence which he claims was prejudicial to him.

The Court of Appeals of the Eighth Appellate District of Ohio concluded and held that after a careful reading of the bill of exceptions and consideration of the assignments of error (including the questions here presented) that no error intervened in the trial that was prejudicial to the substantial constitutional rights of the defendant or that prevented him from having a fair trial. The Ohio Supreme Court refused to review.

The entire record must be examined, not just a portion thereof but all matters pertaining to evidence, including the admissions of the defendant to members of the police department and his admissions in open court as to his participation in violating the narcotic laws of Ohio. It is at once evident that his basic defense is premised upon the original motion to suppress the evidence. We submit that it is clearly shown by the evidence adduced at the trial and at the hearing of the motion, that the police depart-

ment at the time the arrest was made, had ample information that a felony was being committed; consequently, they had probable cause to make the arrest. The respondent contends that the arrest was legal, and evidence of the search after the legal arrest and the articles of contraband it produced were properly admitted in the evidence.

The Supreme Court of Ohio properly overruled petitioner's motion for leave to appeal. There is therefore no substantial federal question involved, nor is there any debatable constitutional question involved herein. Under the questions presented in the petitioner's brief this Court has no jurisdiction to review this case and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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